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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 460

HAROLD S. ANDERSON, JR. and ALFRED E. OHL, individually and as copartners, doing business as H. S. ANDERSON COMPANY,

Petitioners,

vs.

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioners,

vs.

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners Harold S. Anderson, Jr. and Alfred E. Ohl, individually and as copartners, doing business as H. S. Anderson Company, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which reversed a judgment in favor of Petitioners rendered by the United States District Court for the Southern District of California, Central Division.

Opinions Below.

The Findings of Fact, Conclusions of Law [R. 52-74; Appx. 4] and Judgment of the District Court [R. 75-76; Appx. 24] are not officially reported. The oral opinion of the District Court [R. 162-165; Appx. 1] is not officially reported. The opinion of the United States Court of Appeals for the Ninth Circuit [R. 178-184; Appx. 26] and the dissenting opinion [R. 185-190; Appx. 34] have not yet appeared in the official reports. A timely petition for rehearing was denied by that Court [R. 196-197; Appx. 37].

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

The judgment of the United States Court of Appeals for the Ninth Circuit was dated and entered on August 25, 1955 [R. 191; Appx. 36]. The order denying the petition for rehearing is dated and was entered on July 30, 1956.

Questions Presented for Review.

First Question.

Whether or not the employees of a business providing food and lodging facilities principally for employees of an industrial establishment but also open to the public, are engaged in a *closely related process or occupation directly essential* to the production of goods for commerce so that their activities are covered by the Fair Labor Standards Act, as amended.

Second Question.

Whether or not, assuming the activities of such employees are covered by said Act, the business of providing food and lodging facilities principally for employees of an industrial establishment but also open to the public, is exempt as a *retail or service establishment* within the meaning of Section 13(a)(2) of the Act.

Third Question.

Whether or not, assuming the activities of such employees are covered by the Act, employees of a business providing food and lodging facilities principally for employees of an industrial establishment but also open to the public, are exempt as *employed in a local retailing capacity* within the meaning of Section 13(a)(1) of the Act.

Statutory Provisions Involved.

Pertinent provisions of the Fair Labor Standards Act of 1938, Chapter 676, 52 Stat. 1060, as amended, Chapter 736, 63 Stat. 910 (29 U. S. C. Section 201, *et seq.*) are as follows:

Section 3(j):

> " 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

Section 13(a)(1) and (2):

> "The provisions of sections 6 and 7 of this title shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . ."

Statement of the Case.

Respondent invoked Federal jurisdiction in the first instance under Section 17 of the Fair Labor Standards Act, as amended (29 U. S. C., Sec. 217).

The facts are established principally by stipulation [R. 14-50]. Additional facts not included in the stipulation were established at the trial by evidence which is uncontradicted in any material respect. The Findings of Fact appear at pages 52 to 74 of the Record (Appx. 4-22).

Petitioners are copartners in a concern doing business as H. S. Anderson Co. Petitioners as independent contractors provide dining and lodging facilities principally, but not exclusively, for industrial establishments at three locations in California. One of such facilities is located near Darwin, California, and provides services to some 225 employees of the Anaconda Copper Mining Company (hereinafter referred to as Anaconda). Such employees are employed in the milling and mining operations of Anaconda. Petitioners operate in accordance with the terms of a contract with Anaconda [R. 38; Stip. Ex. B].

Approximately eleven persons are regularly employed by Petitioners at the Anaconda operation. These employees consist of a manager, a chef, commissary clerk, second cook, dishwasher, waiters, combination men and janitors. In addition to making dining, lodging and commissary service available to employees of Anaconda, Petitioners' facilities are open to the public and are on occasion utilized by other than Anaconda employees [R. 53].

Petitioners' facilities consist of a dining room, kitchen, a commissary where beer, soft drinks, tobacco, toilet and similar articles are sold, and a lodging facility consisting of a lobby and single and double rooms [R. 53-54].

Some 20 to 25% of the employees of Anaconda regularly utilize Petitioners' facilities. The other employees of Anaconda obtain their meals and live elsewhere. Some 29 Anaconda employees (about 50% of the number who utilize Petitioners' facilities) live in the neighboring communities; of these 7 live in the town of Darwin, about a mile from Anaconda, 10 live in Keeler, approximately 22 miles away, 10 live in Lone Pine, located 37 miles away, and 2 others live at intermediate points [R. 55-56]. These employees commute daily over paved, two lane highways open all year.

School children of Anaconda employees and others in the area daily attend school in Lone Pine commuting by bus.

The principal mode of passenger transportation is by automobile. Some 50% of the employees who utilize Petitioners' facilities own automobiles and the remaining employees ride with them when there is need or occasion for transportation.

The town of Lone Pine is located on U. S. Highway 395. It has a population of approximately 1,415 and contains a number of restaurants, motels, a hotel, boarding houses, and rooming houses available to the general public [R. 62-63; Stip. Exs. R-W]. Other surrounding communities with lesser facilities are Darwin, Olancha, Keeler and Panamint Springs [R. 59-63; Stip. Exs. E-V].

Employees of Anaconda are not confined to Anaconda property or required by Anaconda to eat or lodge at any particular place [R. 64].

Petitioners' facilities are not remote and isolated to such an extent that they are removed from ordinary business competition [R. 69].

Petitioners' facilities are maintained as a convenience only. In the event that the sales and services provided by Petitioners at their Darwin operation should be curtailed or abandoned entirely, there would be only a temporary inconvenience to the operation of the mine. There would be no significant or substantial effect upon production or shipments of Anaconda. In the event such activities were curtailed or abandoned, employees who might leave as a result could be replaced normally within a relatively short time [R. 69].

Additional facts concerning the issues raised by Sections 13(a)(1) and (2) of the Act, which are also either stipulated or established by uncontradicted evidence, are as follows:

All of Petitioners' annual gross income from the Darwin operation results from the furnishing of goods and services within the State of California [R. 29, 73].

All of the meals served, goods sold, and lodging furnished by Petitioners are to persons who consume such meals or goods or utilize such services in the Anaconda area and in the State of California. All of such sales and services are to ultimate consumers and none is for resale. Over 75% of the total annual dollar volume results from the dining and commissary operations alone [R. 29, 73, 64-65].

The sales and services provided by Petitioners' Darwin operation are recognized and known as retail sales or services in the restaurant industry:

(1) The United States Bureau of Census classifies Petitioners' business as a retail trade [R. 152-153; Def. App. Ex. F].

(2) The United States Office of Price Administration, during the period of its existence, classified Petitioners' business as part of the restaurant industry [R. 153-154; Def. App. Ex. G].

(3) Petitioners' business is a part of the restaurant industry [R. 148-154; Def. App. Exs. A-E]. The term "retail sales or services" has a recognized meaning in the industry; namely, the sale or service of a meal to the consumer, generally consumed on the premises of the establishment. Petitioners sales and services are included within this definition and are recognized and known as retail sales or services in and by the restaurant industry [R. 156].

Each of Petitioners' employees is customarily and regularly engaged during all of his working time in making retail sales of goods or services of which 100% of the dollar volume is made within the State of California, his place of employment. Such duties consist of dishwashing, cooking, waiting, and cleaning. The duties of Petitioners' employees are described by stipulation on pages 66 to 68 of the Record.

ARGUMENT.

Preliminary Statement.

The issues involved in this case present important questions as to the scope of coverage of the Fair Labor Standards Act and as to the extent of the exemptions provided by the Act.

Numerous other companies throughout the United States operate dining and lodging facilities similar in service and function to those provided by Petitioners. The importance of the questions presented is shown by the fact that the number of industrial food establishments in the United States exceeds 26,000.*

The questions presented here thus affect an entire industry—the industry which provides dining and lodging services principally for persons employed in industrial establishments.

This Court, in many cases, has recognized that determination of the extent of coverage and the scope of the exemptions under the Fair Labor Standards Act is of such importance as to warrant the matter finally being resolved by this Court.** This is particularly true where

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*"America Eats Out" (1955), published by the National Restaurant Association, page 3. See also Def. Ex. G.

**We granted certiorari, believing that the proper administration of the Fair Labor Standards Act requires a resolution of the questions presented."

Maneja v. Waialua Agri. Co. (1955), 349 U. S. 254, 258-259.

"As of the extent of the coverage by reason of the phrase 'engaged in commerce' is important in the administration of the Fair Labor Standards Act, we granted certiorari."

McLeod v. Threlkeld (1943), 319 U. S. 491, 492.

"Despite the concurrence of views of the two Circuit Courts of Appeals, we brought the cases here because of the important questions presented as to the scope of the Fair Labor Standards Act."

Kirschbaum Co. v. Walling, 316 U. S. 517, 520.

not just one company but an entire industry is affected by the determination. The proper administration of the Act requires that this Court resolve these questions. Respondent himself in the trial court pointed out that the instant action was necessary in order to determine the extent of coverage of the Act [R. 168].

Judge Carter of the Federal District Court, the trial judge, determined that the activities of Petitioners' employees were not covered by the Act and that in any case Petitioners' business was a retail or service establishment [R. 162; Appx. 1].

Judge Fee of the United States Court of Appeals for the Ninth Circuit would have affirmed [see dissent, R. 185; Appx. 34].

But a majority of the Court below determined that Petitioners' employees were covered by the Act and that this conclusion was inconsistent with the concept of a retail establishment. The majority consisted of Judge Stephens and Federal District Court Judge Wiig, sitting *pro tem.*

The majority opinion of the Court below, we earnestly urge, is directly contrary to the decisions and pronouncements of this Court, contrary to the decisions of the Tenth and Sixth Circuits and of various District Courts, and contrary to the provisions of the Act and congressional intent as shown by unusually clear legislative history. As pointed out by the dissenting opinion, statements of fact basic to the decision are directly contrary to the Findings of Fact which are based entirely upon stipulation and uncontradicted, unchallenged evidence. The applicability of the Section 13(a)(1) exemption was not considered at all.

We do not believe it to be an exaggeration to state, and the following points will demonstrate, that the error in the application of the Act by the Court below is strikingly manifest and distinct. The importance of the questions presented and the number of employees and establishments affected requires the consideration and determination of this Court.

I.

The Decision Below Is in Conflict With the Decisions and Pronouncements of This Court.

This Court recently has had occasion to consider whether the employees of a large farming enterprise who were engaged in maintaining lodging facilities provided by the enterprise for its employees, were covered by the Fair Labor Standards Act. The case, directly in point, was decided subsequent to the principal decision in the instant case but prior to the order denying rehearing. That decision is *Mancja v. Waialua Agric. Co.* (1955), 349 U. S. 254, which involved questions as to whether various groups of employees of the enterprise were covered by Section 3(j) of the Act. One of these groups of employees performed the same type of work as that performed by the employees of Petitioners.

The enterprise provided housing facilities "where the great majority of its employees live." Such housing was made available to the employees of the enterprise because lodging facilities elsewhere were inadequate (349 U. S. at 257-258). The issue was whether the activities of the employees who maintained such lodging facilities were closely related or directly essential to the production of goods for commerce. This Court determined that *they were not covered.* The Court stated:

> "Under the 1949 Amendments to the Act, the work of the employees in maintaining the town

> clearly is not covered. 63 Stat. 911, 29 USC §203(j). The question presented in this case, therefore, is of small import in itself. Even so, to come within the coverage of the Act prior to this amendment, the activity of such employees must have a 'close and immediate tie with the process or production.' *Kirschbaum Co. v. Walling,* 316 U. S. 517, 525, 86 L. Ed. 1638, 1648, 62 S. Ct. 1116. *We do not believe such a tenuous relation as here established is sufficient"* (349 U. S. at 271).*

The conflict between the *Maneja* case and the instant case is more pronounced when it is considered that:

1. The employees were employed directly by the producer in commerce rather than by an independent contractor as here.

2. The "great majority" of employees in the *Maneja* case utilized the housing facilities; in the instant case, only 20-25% do so.

The majority opinion below stated the principle which controlled its decision as follows:

> "It is of course essential that employees have adequate food and lodging and if these are not available otherwise, there can be no product unless the employer acts to furnish them. When he does so, employees working in such facility are doing work as 'necessary' or as 'essential' as those who work in the 'factory' proper."

This, of course is directly contrary to the decision in the *Maneja* case. In the *Maneja* case it is stated that lodging facilities were inadequate for employees of the enterprise.

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*Emphasis ours throughout unless otherwise indicated.

As a result the enterprise acted to furnish them and itself employed the persons involved to maintain such facilities. Nevertheless this Court held that such employees were *not* covered by the Act.

The majority opinion of the Court below holds in substantially the same fact situation that the employees are covered by the Act. We submit that this is a direct conflict which cannot be reconciled.

This Court has also decided a case involving a similiar fact situation even prior to the 1949 amendments. In *McLeod v. Threlkeld* (1943), 319 U. S. 491, the employees involved were engaged by an employer to prepare and serve meals to maintenance-of-way employees of a railroad. The employer was a partnership with a contract to furnish meals to the railroad employees. The meals were served in a railroad kitchen and dining car attached to a particular gang of workmen and located on the tracks of an interstate carrier. The car was set conveniently to the place of work of the boarders and in emergencies followed the gang to the scene of its activities. The employees paid the contractor for their meals by orders authorizing the railroad company to deduct the amount of their board from wages due, and to pay it to the contractor. Because of the very nature of the work the employees would have to utilize the facilities since on many if not most occasions no others would be available in the desolate areas where this type of work had to be done.

The issue was whether such employees were engaged in commerce within the meaning of Section 3(j).

In holding that such employees were not covered by the Act, this Court stated:

> "It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other."
>
> *McLeod v. Threlkeld,* 319 U. S. 491, 497.

The test in the *McLeod* case was whether such employees were "engaged in commerce." We believe, however, that the foregoing statement as to the nature and effect of this type of operation makes this an immaterial distinction within the meaning of the Act.

The furnishing of food and lodging would be as essential for the continuance of the labor of a man enaged in commerce as for one engaged in the production of goods for commerce. This Court has held that the furnishing of food is "remote from commerce." If it were remote from commerce, it must be equally remote for the production of goods for commerce. There can be no logical distinction upon this basis.

This conclusion was reached in *Kuhn v. Canteen Food Service* (N. D. Ill., 1944), 77 F. Supp. 585, involving a very similar factual situation.

II.

The Decision Below Is in Conflict With Decisions of the Tenth and Sixth Circuits and Various Federal District Courts.

The United States Court of Appeals for the Tenth Circuit has decided the same basic issue contrary to the decision below. A review of the facts and the opinion shows a clear conflict which only this Court can resolve.

In *Juarez v. Kennecott Copper Corp.* (10th Cir., 1955), 225 F. 2d 100 a mining company itself owned and operated a hospital located at the rim of an open pit mine in New Mexico. It was contended by plaintiff that the work of the employees of the hospital was so closely related and so essential to the production of goods for commerce as to place them within the coverage of the Act. The Court denied this contention and found that the Act *did not cover* such employees. The Court said:

> "The cases nearest in point are those involving restaurant employees and cooks employed in feeding employees engaged in commerce or the production of goods for commerce. Appellants cite a number of cases in which such employees were held to be covered by the Act. Most of these cases arose prior to the amendment of Section 203(j) of the Act in 1949. By that amendment the word 'necessary' was dropped from the Act and the words 'in any closely related process' were added, making the section read 'or in any other manner working on such goods or *in any closely related process* or occupation directly essential to the production thereof, in any State.' We think it is clear from the legislative history that this amendment was to restrict coverage with respect to such employees. The conference report (H. R. Rep. No. 1453, 81st Cong., 1st Sess., Oct. 17, 1949, W. H. M. 6:607) states, 'The courts have also held the act

applicable to employees engaged in maintaining and repairing private homes and dwellings where such homes and dwellings are being leased by interstate producers to their employees. Coverage of the Act has also been extended to employees of an individually owned and operated restaurant located in a factory McComb v. Factory Stores Co., D. C. N. D. Ohio, 1948, 81 F. Supp. 403.

" 'Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and more direct relationship to the producing, manufacturing, etc. activity than was true in the above-cited cases.' " (Emphasis by the Court).

Juarez v. Kennecott Copper Corp., 225 F. 2d at 102.

The factual situations are very similiar. In one case the employees maintained and operated a hospital at the rim of an open pit mine providing the usual services for employees of the Kennecott Copper Corporation among others. In the instant case the employees involved maintained and operated a food and lodging facility providing the usual services for employees of Anaconda, among others.

The only difference is between a hospital service and a food and lodging service—a distinction we submit is of no consequence. Indeed, the Tenth Circuit relied upon their similarity in reaching its decision.

The conflict with the *Juarez* case is even more direct when it is considered that there the employees were actually employees of the producer of goods for commerce. Here they are employees of an independent contractor who operates similiar facilities for other companies, not just for Anaconda.

The tests applied by the two circuits to determine extent of coverage of the Act are entirely different and opposed to each other. So are the results.

In the decision below the 1949 amendments and the legislative history with respect thereto are almost entirely ignored. The test applied is that established by the Ninth Circuit in 1942 under the old law and long before the 1949 amendments.* The Tenth Circuit decision on the other hand recognizes the clear statutory requirements and the directly applicable legislative history. The decisions are in direct conflict.

The decision below is also in conflict with that of the Sixth Circuit in *Factory Stores Co. v. McComb* (6th Cir., 1949), 179 F. 2d 238 (this case is discussed below under Point III). The factual situation is strikingly similar to that involved here. The District Court's decision in that case, handed down prior to the 1949 amendments, was the same in reasoning and result on both the coverage and retail and service exemption questions, as the majority opinion below. It found that the Act covered the employees involved because their activities were "integrated"

**Consolidated Timber Co. v. Womack* (9th Cir., 1942), 132 F. 2d 101, involved a cookhouse provided and operated by the producer in commerce at an isolated lodging camp. Access was impossible except by Company train or track speeder. The case was decided under the "necessary" test prior to the 1949 amendment to Section 3(j). The differences in the factual situation between that case and the instant case are apparent. Equally significant, however, is the fact that the Court below in the *Womack* case relied almost entirely upon the reasoning and conclusions in *Philadelphia, Baltimore & Washington Railroad Company v. Smith*, 250 U. S. 101, decided in 1919. That case arose under the Federal Employers Liability Act. But subsequent to the *Womack* decision and prior to the 1949 amendments to the Act, this Court specifically held that the *Smith* case "should not govern our conclusions under the Fair Labor Standards Act." *McLeod v. Threlkeld* (1943), 319 U. S. 491, 496.

with the production process. It found in effect that the facility was not a retail or service establishment because this would be inconsistent with the conclusion that it was integrated with the production process.

The case was appealed to the Sixth Circuit. While pending there it came under discussion in Congress in connection with the 1949 amendments. The case was frequently referred to by name in the legislative history. It was criticized and specifically reversed by Congress.

As a result, Respondent, Appellee in that case, moved to remand and Appellant there similarly moved. The Court, because of the passage of the 1949 amendments, remanded the case to the District Court.

While the Sixth Circuit did not specifically decide the merits of the case, it found in effect that the law applicable to this factual situation had been changed. The majority decision below, however, specifically determined that the 1949 amendments did not change the law applicable to this situation. Under its decision the remand of the Sixth Circuit would not have been made. The conflict between the two decisions is basic.

The decision below is also directly contrary to a number of Federal District Court decisions involving substantially the same factual situation.

See:

Kuhn v. Canteen Food Service (N. D. Ill., 1944), 77 F. Supp. 585;

Bayer v. Courtemanche (D. Conn., 1947), 76 F. Supp. 193;

Tipton v. Bearl Sprott Co. (S. D. Cal., 1950), 93 F. Supp. 496, 505, *vacated on other grounds,* 175 F. 2d 432.

See also:

Relander v. Mason County Logging Co. (Wash. Super. Ct., 1942), 2 W H Cases 1052.

We submit that the conflict between the Ninth Circuit and the Tenth and Sixth Circuits is direct and should be resolved by this Court.

III.

The Decision Below Is in Conflict With the Provisions of the Fair Labor Standards Act Itself, as Confirmed by Unusually Clear Legislative History.

The majority decision below holds that the activities of Petitioners' employees are covered by the Act in that such activities are part of a closely related process or occupation directly essential to the production of goods for commerce, within the meaning of Section 3(j). It also holds that Petitioners' business is not a retail or service establishment within the meaning of Section 13(a)(2).

Concerning the coverage of the Act, as amended, under Section 3(j):

Section 3(j) of the Act, as amended, states ". . . for the purpose of this Act, an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in any closely related process or occupation directly essential to the production thereof,* in any State."

Prior to the 1949 amendments to the Act, Section 3(j) established the test in this respect to be whether

the employees were engaged "in any process or occupation *necessary* to the production" of goods for commerce.*

The Wage and Hour Administrator, in interpreting the Act prior to its amendment, placed a very broad interpretation upon the word "necessary," in many cases construing it to mean little more than "convenient." The courts sometimes followed the views of the Administrator. Several cases were decided under the Act prior to its amendment in which "necessary" was thus broadly interpreted.**

In amending the Act in 1949, Congress severely criticized this result, among others, as being contrary to its intent in enacting Section 3(j). As a result, this section was amended to substitute for the word "necessary," much stronger words, namely, "closely related" and "directly essential."

The attitude of Congress is clearly revealed in the legislative history of the 1949 amendments. It is particularly clear with respect to the factual situation involved in this case. A review of this history concerning the amendment to Section 3(j), can leave little doubt that it was not the Congressional intent to extend coverage to the category of business involved here.

Such intent is shown by a detailed consideration of the circumstances and history of *McComb v. Factory Stores Co. of Cleveland* (N. D. Ohio, 1948), 81 F. Supp. 403.

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*52 Stat. 1061 (1938).

** *McComb v. Super-A Fertilizer Works* (1st Cir., 1948), 165 F. 2d 824;

E. C. Schroeder Co. v. Clifton (10th Cir., 1946), 153 F. 2d 385 *cert. den.* 328 U. S. 858;

Martino v. Michigan Window Cleaning Company (1946), 327 U. S. 173.

The facts in that case are very close to those in the instant case:

1. The issue was whether the Act covered persons employed by an industrial eating facility similar to that involved here; and if so whether such facility was a retail or service establishment.

2. Canteens providing eating facilities were located in the various plants of the Republic Steel Company. The canteens were maintained adjacent to the places of work so that the employees could "eat whenever they get an opportunity, so that it does not interfere with the performance of their duties" (81 F. Supp. at 405).

3. In the instant case the majority decision below placed considerable weight upon the fact that "Anaconda kept a strong guiding hand over Operator in the operation of the facility" [R. 179; Appx. 27]. But the contract between Factory Stores Co. and Republic Steel Company was in all substantial respects the same type of contract as that involved here (81 F. Supp. at 404).

4. Most, if not all of the employees utilized the Factory Stores' facilities; in the instant case only 20-25% of the Anaconda employees do so. (81 F. Supp. at 405.)

5. Frequent meetings were held between Republic and the Union with respect to the quantity and quality of meals, an item relied upon by Respondent here. Indeed Republic employees refused to work unless food was obtainable. (81 F. Supp. at 409.)

6. Company security regulations prohibited employees from leaving the plant. Quite apart from such rule, the facts were that

"outside restaurants because of the lack of transportation facilities are too remote to be patronized"

(81 F. Supp. at 409), and even if employees had the time they "would find it very difficult if not impossible with the available transportation facilities" to utilize outside restaurants. (81 F. Supp. at 405.)

The trial court's decision in *Factory Stores,* both on the coverage question and the retail service exemption question (discussed below), is substantially the same as the majority opinion below.

The case was appealed to the Sixth Circuit and was pending there when it came under discussion in Congress in connection with the 1949 amendments to the Act. The case was frequently referred to by name. The decision was criticized and specifically reversed by Congress.

The House Managers' Statement on the bill resulting from the Senate-House Conference and later enacted into law by signature of the President on October 26, 1949,* states in part as follows:

"Coverage of the act has also been extended to employees of an independently owned and operated restaurant located in a factory (McComb v. Factory Stores, 81 F. Supp. 403 (N. D. Ohio, 1948)).

"Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc., activity than was true in the above cited case. . . ."

* * * * * * * *

"The following are some examples of cases in which the Administrator and the courts will no longer

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*House of Representatives Report No. 1453, 81st Cong., 1st Sess., Oct. 17, 1949; 95 Cong. Rec. 14931-14932, Oct. 18, 1949.

be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production: . . ."

* * * * * * * *

"All such employees, as well as the employees of the merchant selling his goods locally and employees engaged in providing residential, eating, or other living facilities for factory workers, are quite clearly not performing any activities that are closely related or directly essential to the production of goods."

95 Cong. Rec. 14928, 14929.*

Mr. Lucas in his statement concerning his bill in the House which incorporated the adopted change in Section 3(j), said:

"Nor could the Administrator hold the act applicable as he has in the past to the following:

* * * * * * * *

"(e) Employees of an independent cafeteria or canteen located in a factory which produces goods for interstate commerce, the cafeteria serving the employees of the Factory—McComb v. Factory Stores Co. (81 F. Supp. 403)."

95 Cong. Rec. 11001.

The conflict of the majority opinion below with the provisions of the Act and with clearly expressed Con-

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*The House Managers' Report was the only report concerning the amendment considered by Congress prior to its enactment. Respondent has placed great weight upon what he calls the "Report of the Majority of Senate Conferees." However, this document was not a "report" at all nor was it part of the legislative history of the amendments. It was not before the Senate during the debates or before the amendments were passed. It represents the views of three senators only and not those of the Conferees or of the Senate. This was recognized by the Senators themselves and is abundantly clear from the record (95 Cong. Rec. 14870-2).

gressional intent to exclude from coverage the type of business involved here, we believe is obvious.

Concerning the application of the retail and service exemption provided by Section 13(a)(2) of the Act, as amended:

Similarly Congress in amending the Act in 1949 intended to redefine the retail and service exemption as it had been applied by the Administrator and the courts. Section 13(a)(2) was entirely rewritten.

The majority opinion below disposes of the retail and service establishment issue by stating merely that its conclusion on the coverage question was "inconsistent with any conclusion that [the facility] is a retail enterprise." [R. 183-184; Appx. 33.] This in substance was the same test applied in the *Factory Stores* case. It was the same test applied by the Court below in decisions prior to the 1949 amendments.*

A review of Section 13(a)(2), as amended, particularly in the light of its legislative history, can leave no doubt that such a test was not intended but rather was rejected by Congress. However such considerations as integration with the production process may be relevant to the coverage question, they are not relevant in determining the exemption questions. The amended Section 13 (a)(2) sets up specific requirements which alone measure the impact upon commerce:

(1) Whether more than 50% of the establishment's annual dollar volume of sales of goods or services is made in California.

Consolidated Timber Co. v. Womack (9th Cir., 1942), 132 F. 2d 101.

(2) Whether 75% or more of the establishment's annual dollar volume of sales of goods or services, or both, is for resale.

(3) Whether 75% or more of the establishment's sales or services are recognized as retail sales or services in the particular industry.*

Congress clearly contemplated that the type of facility involved here constituted a retail and service establishment. Again, the text of the House Managers' Statement is very relevant in this respect. Again, the *Factory Stores* case is referred to by name.

> "Exemptions
>
> *"General statement.*—The House bill substantially revised Section 13 (a) (2) of the Act relating to retail and service establishments. . . .
>
> * * * * * * * *
>
> "The amendment (Sec. 13 (a) (2)) agreed to in conference clarifies the existing exemption by defining the term 'retail or service establishment' and stating the conditions under which the exemption shall apply. This clarification is needed in order to obviate the sweeping ruling of the Administrator and the courts that no sale of goods or services for business use is retail. See *Roland Electrical Co. v. Walling* (326 U. S. 657); *McComb v. Diebert* (E. D. Pa., 1949), 16 Labor Cases, par. 64,982; *McComb v. Factory Stores* (81 F. Supp. 403 (N. D. Ohio, 1948)).
>
> "Under paragraph (2) of Section 13 (a) as agreed to in conference, an establishment is an exempt retail or service establishment if it meets three tests:

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*Prior to its amendment Section 13(a)(2) provided:

"The provisions of Sections 6 and 7 shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." 52 Stat. 1067 (1938).

"First, over 50 per cent of the establishment's sales by annual dollar volume of goods or services must be made within the state in which the establishment is located. . . . Under the new test, if the sales are made within the state in which the establishment is located, *it is immaterial that the sales . . . (c) are made to customers who are engaged in interstate commerce or in the production of goods for interstate commerce.* . . .

* * * * * * * *

"The second test provides that in order for an establishment to be exempt, not less than 75 per cent of its annual dollar volume of sales of goods or services (or both) must not be for resale. . . .

"The third test provides that 75 per cent of the establishment's annual dollar volume of sales of goods or services (or of both) must be recognized in the particular industry as retail sales or services. *Under this test any sale or service, regardless of the type of customer, will have to be treated by the Administrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service.* . . . Likewise, sales or service of hotels, restaurants, barber and beauty shops, repair garages, filling stations and the like, *whether made or rendered to private householders or to business customers,* will be retail so long as they are recognized as retail sales or services in such industries.

* * * * * * * *

"The location of the establishment, whether in an industrial plant, an office building, railroad depot, or a Government park, etc., will make no difference in the application of the exemption. So long as the establishment meets the tests described above, it will

be excluded from the minimum wage and overtime provisions of the Act."

House Managers' Statement (House of Representatives Report No. 1453, 81st Cong., 1st Sess., Oct. 17, 1949; 95 Cong. Rec. 14931-14932, Oct. 18, 1949).

To review the record concerning the applicability of Section 13(a)(2):

The first two criteria required by Section 13(a)(2) were established by stipulation and incorporated in the Findings of Fact [R. 73; Appx. 22].

It was therefore only necessary for the exemption to apply to establish the third requirement, namely, that 75% or more of the annual dollar volume of sales of goods or services were recognized as retail sales or services in the particular industry. This was established by substantial, uncontradicted evidence, indeed the only evidence which was available, as follows:

(a) The United States Bureau of Census in its Census of Business classifies Petitioners' business as retail [R. 152-153; Def. Ex. F].

(b) The United States Office of Price Administration during the period of its existence, classified Petitioners' business as part of the restaurant industry [R. 153-154; Def. Ex. G].

(c) Petitioners are part of the restaurant industry and participate in the activities of that industry. Their business is a retail activity by tradition and practice and within the definitions of the restaurant industry. Petitioners' sales and services are recognized and known as retail in and by the restaurant industry [R. 148-154; Def. Exs. A-E].

Respondent did not introduce a single item of evidence to rebut this proof. It is uncontradicted. Indeed, the

relevance of the evidence with respect to the U. S. Bureau of Census and the Office of Price Administration is conceded by Respondent. In other cases Respondent himself, in applying this test, has introduced and relied upon classifications by the U. S. Bureau of Census and other governmental agencies. (See *Mitchell v. T. F. Taylor Fertilizer Works* (5th Cir., 1956), 233 F. 2d 284 and *Boisseau v. Mitchell* (5th Cir., 1955), 218 F. 2d 734.)

The only possible conclusion upon the record and the law, we urge, is that Petitioners' facility constitutes a retail and service establishment within the meaning of Section 13(a)(2), as amended.

The majority decision below is, we believe, wholly in conflict with the Act and with the unmistakably clear intent of Congress both with respect to the coverage question and the retail and service exemption.

IV.

The Stated Factual Basis Upon Which the Decision Below Rests Is in Direct Conflict With Unchallenged Findings of Fact in Crucial Respects.

The majority opinion rests its opinion upon statements of fact which are basic to the decision but which are directly opposed to those found by the District Court upon stipulated and uncontradicted evidence.

For example, the opinion states:

> ". . . in each instance the facility furnished was without a question needed, and without it the production would have been affected." [R. 181, Appx. 30.]
>
> * * * * * * * *
>
> "Is it clear that the hiring of men and the continuity of service would not be made substantially difficult

if the facility should be abandoned?" [R. 183, Appx. 32.]

But the Findings of Fact specifically state that:

"In the event that the sales and services provided by defendants at their Darwin operation should be curtailed or abandoned entirely there would be only a temporary inconvenience to the operation of the mine; the effect upon production at the mine would be unsubstantial even during this temporary period. There would be no significant effect upon total shipments from the mine, particularly in view of stocks of ore that are kept in reserve. During the period of a recent strike threat some 20 to 25 employees terminated their employment. Shipments from the mine were not affected as a result thereof." [Finding 19, R. 68-69, Appx. 18.]

". . . the presence or absence of defendant's type of facility would not be a deciding or important factor in the existence of a labor supply." [Finding 25, R. 73, Appx. 21.]

The Findings also establish, contrary to the majority opinion, that Petitioners' facilities are maintained as a convenience only; that mining and milling employees tend to prefer to live in communities even at considerable distances because of the increased desire for community living, improved roads and better transportation. Furthermore, the Findings establish that Petitioners' facilities are not remote or isolated to such an extent that they are removed from ordinary business competition. This is not the case of an isolated lumber camp. Other facilities are not only available, but are actually used by 75 to 80% of the employees of Anaconda [R. 52-74; Appx. 4].

The Findings were all supported by substantial evidence, stipulated and uncontradicted. They have not been seriously challenged.

Not only the tests applied by the Court below are in error, but so also are the factual statements on basic points upon which the decision rests.

V.

The Court Below Improperly Performed Its Function in That It Did Not Decide or Consider in Its Opinion Whether Petitioners' Employees Are Exempt Under Section 13(a)(1) of the Act.

Section 13(a)(1) exempts from the relevant sections of the Act any employee employed in a local retailing capacity. Although raised as an issue before the Court below and upon rehearing, the majority did not decide or consider in its opinion the application of this section.

Section 13(a)(1) provides:

> "The provisions of Sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, . . . (as such terms are defined and delimited by regulation of the Administrator): . . ."

The Administrator of the Act was given specific authority to establish the criteria for this exemption. He has done so as follows:

> "The term 'employee employed in a bona fide * * * local retailing capacity,' in Section 13(a)(1) of the Act, shall mean any employee:
>
> "(a) who customarily and regularly is engaged in:
>
> "(1) Making retail sales of goods or services of which more than 50 per cent of the dollar volume are made within the state where his place of employment is located, or
>
> "(2) Performing work immediately incidental thereto, such as the wrapping or delivery of packages; and

"(b) whose hours of work of a nature other than that described in paragraphs (a)(1) or (2) of this section do not exceed 20 per cent of the hours worked in the workweek by nonexempt employees of the employer."

29 *C. F. R.* Chap. V, §541.4.

In view of the facts, most of which have been stipulated, and the uncontroverted evidence, it is quite clear that each of the employees of Petitioners are exempted according to the tests established by this section. These employees consist of cooks, waiters, dishwashers and clean-up men. They are engaged in the most traditional of retail activities. The duties of each is described in Stipulation of Facts [R. 27-29] and are incorporated in the Findings of Fact [R. 66, Appx. 16].

The nature of the employer's business under this exemption is not determinative. It is the activity of the employee that is controlling. The Administrator himself has recognized that this is the interpretation required by the specific language of the Act, as follows:

"the section 13(a)(1) local retailing capacity exemption depends on the capacity in which the particular employee is employed, and not on the character of the establishment in which or by which he is employed. It is not material, therefore, in determining the applicability of the section 13(a)(1) exemption to any particular employee, whether the establishment in which or by which he is employed is a retail or service establishment or a wholesale or a manufacturing establishment. Thus, for example, an employee of a wholesale or a manufacturing establishment who is employed in a local retailing capacity as that term is defined by the Administrator, may be exempt from the wage and hours provisions of

the Act even though the other employees of the establishment are nonexempt. * * *"

29 C. F. R. Ch. V, §779.28.

This important issue is separate and apart from the other issues in the case. In view of the decision on the other issues, this issue must be decided in order to properly dispose of this case. The Court below failed to do so and resort can only be had to this Court.

Conclusion.

We earnestly urge that there is a vital basis and cause for this Court to grant the Petition and hear this matter.

The issues involve the scope and limits of coverage of the Fair Labor Standards Act and of the exemptions provided by that Act. A substantial industry and its employees are involved. The decision below we believe to be manifestly in error by any appropriate standard. *It is in conflict with the decisions and pronouncements of this Court. It is in conflict with the decisions of the Tenth and Sixth Circuits.* It is in direct conflict with the Act particularly as shown by its legislative history. It is even in open conflict in its statement of crucial facts with the Findings of Fact, which are based upon stipulated and uncontradicted evidence. It failed to decide an important issue requiring decision.

Congress considered the type of activity involved here local in nature, to be subject to local, not Federal regulation.

Respectfully submitted,

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Dated: September 26, 1956.

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